

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re

BURGESS BIOPOWER, LLC, *et al.*¹

Debtors.

Chapter 11

Case No. 24-10235 (LSS)
(Jointly Administered)

Re: D.I. 39

**DEBTORS' OBJECTION TO MOTION OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, PURSUANT
TO 28 U.S.C. § 1412 AND FEDERAL RULE OF BANKRUPTCY
PROCEDURE 1014(A), TO TRANSFER VENUE OF BANKRUPTCY
PROCEEDINGS TO UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Burgess BioPower, LLC ("Burgess BioPower") and Berlin Station, LLC ("Berlin Station"), the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), through their proposed undersigned counsel, hereby submit this objection (the "Objection") to the *Motion of Public Service Company of New Hampshire, Pursuant to 28 U.S.C. § 1412 and Federal Rule of Bankruptcy Procedure 1014(a), to Transfer Venue of the Bankruptcy Proceedings to United States Bankruptcy Court for the District of New Hampshire* [D.I. 39] (the "Venue Motion"). In support of this Objection, the Debtors rely upon the *Declaration of Dean Vomero in Support of Debtors' Objection to Motion of Public Service Company of New Hampshire, Pursuant to 28 U.S.C. § 1412 and Federal Rule of Bankruptcy Procedure 1014(a), to Transfer Venue of the Bankruptcy Proceedings to United States Bankruptcy Court for the District of New Hampshire* (the "Vomero Declaration") and the

¹ The Debtors in these Chapter 11 Cases, along with the last four digits of each Debtor's federal tax identification number, are Burgess BioPower, LLC (0971) and Berlin Station, LLC (1913). The Debtors' corporate headquarters are located at c/o CS Operations, Inc., 631 US Hwy 1, #300, North Palm Beach, FL 33408.

Declaration of Robert K. Malone in Support of Debtors' Objection to Motion of Public Service Company of New Hampshire, Pursuant to 28 U.S.C. § 1412 and Federal Rule of Bankruptcy Procedure 1014(a), to Transfer Venue of the Bankruptcy Proceedings to United States Bankruptcy Court for the District of New Hampshire (the "Malone Declaration") filed contemporaneously herewith and, respectfully, state as follows:

Preliminary Statement

1. A debtor's choice of a proper forum is entitled to great weight. Public Service Company of New Hampshire, which does business as Eversource Energy ("Eversource"), concedes that venue in this Court is proper under 28 U.S.C. § 1404, but nevertheless—in what appears to be a pure litigation tactic—urges the Court to transfer these Chapter 11 Cases to the New Hampshire Bankruptcy Court under 28 U.S.C. § 1412 “for the convenience of the parties and in the interest of justice.” Venue Motion at ¶¶ 60-65, 98. Eversource, as the movant, bears the burden of proof, by a preponderance of the evidence, that transfer is warranted under either prong of 28 U.S.C. § 1414. Eversource has not met this heavy burden, and, in fact, failed to provide any support or evidence for the Venue Motion.

2. Underlying Eversource's claim that these cases “belong in New Hampshire”, *see* Venue Motion at p. 1, is the location of the Facility in Berlin, New Hampshire. From there, Eversource concocts a narrative that everyone impacted by these Chapter 11 Cases resides or does business in New Hampshire – going as far as asserting that it is the “only creditor” in these Chapter 11 Cases. This narrative is simply false:

- The Debtors are both organized under the laws of the state of Delaware – not New Hampshire – and have been since the time that Eversource first entered into the PPA² with Berlin Station;
- The Debtors do not have any employees, let alone individuals who work at the Facility. Instead, site personnel and back-office employees are employed by non-debtor affiliates CS Operations, Inc. (“CS Operations”) and CS Berlin Ops, Inc. (“CS Berlin Ops”), which are Delaware Corporations that are headquartered in Florida – not in New Hampshire;
- The Debtors’ books and records are maintained in the State of Florida – not New Hampshire;
- Dean Vomero, the Debtors’ Chief Restructuring Officer (“CRO”), spends the majority of his time working for the Debtors in these Chapter 11 Cases in Florida, where the Debtors’ books and records and administrative offices are located, and has only visited the Facility one time, for approximately six (6) hours;
- The Debtors’ directors are located in Delaware (3 directors), Florida (3 directors), Texas (1 director) and Ohio (1 director); the Debtors’ CRO is also located in Ohio;
- Most, if not all, of the Debtors’ *other* creditors, including, among others, the Senior Secured Noteholders (to whom the Debtors are indebted in excess of \$115 million and who have agreed to provide an additional \$18 million in DIP financing) and the subordinated debt holders, are located in states other than New Hampshire;³
- The Cate Street Bankruptcy Case (as defined in the Venue Motion) is a chapter 7 proceeding pending in New Hampshire, in which there has been little or no activity since September 2022, and has nothing to do with the Debtors and their restructuring efforts; that case largely concerns the chapter 7 debtor’s assignment of the PMA, with little to no relevance to the PPA;⁴
- These Chapter 11 Cases concern more than the PPA, its breach and its termination; they concern finding a path forward for the Debtors under a chapter 11 plan that provides for a “toggle” between a balance sheet restructuring or an asset sale;
- Eversource is not the Debtors’ exclusive customer nor do the Debtors sell products exclusively in New Hampshire. Eversource is the exclusive customer for energy and

² Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the *Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors’ Chapter 11 Petitions and First Day Pleadings* [D.I. 4] (the “First Day Declaration”) (as defined herein) and the Vomero Declaration, as applicable.

³ This is in direct contrast to Eversource’s assertion that it is the “sole creditor” in these Chapter 11 Cases.

⁴ Furthermore, upon information and belief, the Judge currently presiding over the Cate Street Bankruptcy Case intends to retire from the Bench in the near future, which, if true, would necessitate a new Judge, to whom the Cate Street Bankruptcy Case would be assigned, to become familiar with the same. *See* Malone Declaration at ¶ 2, Ex. A.

capacity; however, the Debtors sell a portion of RECs to other buyers throughout the United States, including in Maryland, Washington DC, Florida, and California;

- Eversource's ratepayer customers across New England are not customers of the Debtors or creditors of their estates;
- None of the Debtors' or other significant constituencies' professionals in these Chapter 11 Cases, including professionals for the Senior Secured Noteholders/proposed DIP Lenders and Collateral Agent, are located or have offices in New Hampshire – they are located in, among other states, Delaware, New Jersey, New York, and Massachusetts; and
- None of Eversource's professionals (three law firms in total) have offices in New Hampshire (indeed Eversource's main counsel is located in Virginia) and, therefore, in much closer proximity to the Delaware Bankruptcy Court than to the New Hampshire Bankruptcy Court;
- The Debtors' assets include bank accounts, two with seven sub-accounts maintained with Deutsche Bank Trust Company Americas in New York and represented by New York counsel and two with M&T Bank, which maintains its principal executive offices in New York⁵; and
- The Debtors spent approximately eighteen months prior to commencing the Chapter 11 Cases reaching out to Eversource in an attempt to restructure the PPA, but Eversource simply refused to speak to them.

See Declaration of Dean Vomero Pursuant to 28 U.S.C. § 1746 in Support of the Debtors' Chapter 11 Petitions and First Day Pleadings [D.I. 4] (the "First Day Declaration") at ¶¶ 16-20, 23-36, 75-79, 92-100; Malone Declaration at ¶ 6, Ex. E, Feb. 13, 2024 Hrg' Tr. 15:11-18.

3. The foregoing facts and the additional facts and considerations discussed herein unequivocally dictate that these Chapter 11 Cases should remain in Delaware. The connections to New Hampshire alleged by Eversource do not justify depriving the Debtors of their choice of forum and derailing these heavily negotiated, prearranged Chapter 11 Cases, with a change in venue. To state the obvious, a venue change at this juncture, in the precarious financial situation in which the Debtors find themselves (in part caused by Eversource), would be disastrous and greatly undermine the goals the Debtors hope to achieve in these Chapter 11 Cases.

⁵ See Malone Declaration at ¶ 3, Ex. B.

4. Further, Eversource purports to be an independent energy supplier which “is located and operates exclusively in New Hampshire.” *See* Venue Motion at ¶ 12. This statement is, at the very least, misleading. As described in further detail herein, Eversource (*i.e.*, the nominal movant, Public Service Company of New Hampshire) is part of Eversource Energy, a publicly-traded Fortune 500 energy company headquartered in Hartford, Connecticut and Boston, Massachusetts (NYSE: ES), which is “New England’s largest energy delivery company with 4 million customers in Connecticut, Massachusetts and New Hampshire.”⁶

5. While Eversource may for strategic reasons prefer to have these Chapter 11 Cases administered in New Hampshire, it already has shown, by filing the Venue Motion and objections to three motions that were filed on the Petition Date or shortly thereafter (through counsel located in Virginia, Pennsylvania, and Delaware, who appeared in person at the First Day Hearing) that is perfectly capable of protecting its interests in this Court. *See* D.I. 39, 40, 44, 46, 84.

6. The Debtors respectfully submit that a transfer of venue to the New Hampshire Bankruptcy Court will not further the interest of justice or the convenience of the parties involved, but rather, will only result in delay and additional costs, threatening the Debtors’ well-planned restructuring efforts. Accordingly, the Venue Motion should be denied.

Background

7. On February 9, 2024 (the “Petition Date”), the Debtors commenced the Chapter 11 Cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the “Court”). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession, pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. As of the date of this

⁶ *See* Malone Declaration at ¶ 4, Ex. C.

Objection, no trustee, examiner or statutory committee has been appointed in these Chapter 11 Cases.

8. This Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. §§ 157 and 1334, and venue of the Chapter 11 Cases in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

9. The Debtors comprise renewable energy power companies that own and operate a 75-megawatt biomass-fueled power plant (the “Facility”) located on an approximately 62-acre site in Berlin, New Hampshire (the “Facility Site”). Berlin Station owns the Facility and the Facility Site, and Burgess BioPower leases the Facility pursuant to a long-term lease as described in more detail in the First Day Declaration and incorporated herein by reference. First Day Declaration at ¶¶ 13, 63.

10. While the Debtors are directly and indirectly responsible for creating numerous jobs in Berlin, they do not directly employ any employees at the Facility and do not operate or manage the Facility on a day-to-day basis. Instead, the Debtors contract with CS Operations and CS Berlin Ops, non-debtor affiliates, for the supply of personnel and services needed to operate and maintain the Facility, produce and sell energy and other products the Facility generates, manage the Facility and the Facility Site, collect revenue, provide back office and overhead support, and otherwise manage and run the Debtors’ business. *Id.* at ¶ 16.

11. CS Operations and CS Berlin Ops are Delaware corporations whose offices are headquartered in Florida. Consequently, the Debtors’ books and records are located at their administrative offices in Florida, where CS Operations’ and CS Berlin Ops’ key personnel are also located. Eversource’s invoices to Burgess BioPower (issued from Hartford, Connecticut) were

sent to “Burgess BioPower, LLC c/o CS Operations, Inc.” at the same North Palm Beach, Florida, address that appears on the Debtors’ bankruptcy petitions. *See* First Day Declaration, Ex. C, E, F.

12. The Facility has been running for over a decade, supplying power to Eversource pursuant to that certain Power Purchase Agreement entered into by and between Berlin Station and Eversource, dated as of May 18, 2011 (as amended from time to time, the “PPA”). *Id.* at ¶ 17. Eversource is headquartered in Hartford, Connecticut, and Boston, Massachusetts. Eversource 2023 10-K at 2. Eversource is not the Debtors’ exclusive customer and the Debtors do not sell products exclusively in New Hampshire. Eversource 2023 10-K at 2. The Debtors sell a portion of their renewable energy certificates (“RECs”) produced at the Facility to other buyers throughout the United States.

13. Eversource is a wholly-owned subsidiary of Eversource Energy, a publicly-traded Fortune 500 energy company headquartered in Hartford, Connecticut and Boston, Massachusetts (NYSE: ES). Eversource 2023 10-K at 2.⁷

14. As discussed in the First Day Declaration, Eversource materially breached the PPA by improperly withholding more than \$3.6 million from the Debtors, essentially cutting off nearly all of the Debtors’ revenue while continuing to consume all of the power produced by the Debtors. First Day Declaration at ¶ 17. The Debtors sent a letter to Eversource giving Eversource notice of its breach and an opportunity to cure pursuant to the terms of the PPA, but Eversource refused to do so. *Id.* Accordingly, after expiration of the cure period, the Debtors terminated the PPA and the related Option Agreement on February 8, 2024. *Id.* at ¶¶ 17, 49, 73.

15. Eversource’s non-payment and material breach of the PPA placed the Debtors in an untenable financial position. *Id.* at ¶ 74. Since that time, the Debtors have received no revenue

⁷ *See* Malone Declaration at ¶ 5, Ex. D.

for their production of energy, and Eversource's actions have completely blocked the Debtors' ability to enter into a new power purchase agreement with another party or to sell energy on a merchant basis, jeopardizing virtually all of the Debtors' revenue streams. *Id.* Absent bankruptcy, the Debtors would not be able to market their assets for a potential sale to a third party given Eversource's actions. *Id.* Therefore, the Debtors seek to sell – and be paid for – their power through other channels while using the protections of Chapter 11 to effect an orderly restructuring for the benefit of their stakeholders. See *id.* at ¶¶ 126-29.

16. To that end, the Debtors engaged SSG Advisors LLC (“SSG”), Applied Business Strategy LLC (“Applied Business”), Foley Hoag LLP (“Foley Hoag”), and Gibbons P.C. (“Gibbons”) to assist in analyzing the Debtors' financial position and to explore options to deleverage the Debtors' balance sheet. SSG is an investment banking boutique firm located in Philadelphia, Pennsylvania. Applied Business is located in Cleveland, Ohio and New York, New York. The Foley Hoag attorneys involved in the Debtors' Chapter 11 Cases are located in New York, New York and Boston, Massachusetts, and the attorneys from Gibbons are located in Newark, New Jersey and Wilmington, Delaware. None of the professionals engaged by the Debtors have an office or are located in New Hampshire.

17. The Debtors' Senior Secured Noteholders, their collateral agent, and other secured creditors are all located in states other than New Hampshire. See First Day Declaration, Ex. M. The Debtors' secured lenders have appeared in these Chapter 11 Cases through law firms located in New York, New York, Boston, Massachusetts, and Wilmington, Delaware. D.I. 12, 48. As evidenced by their Objection, the Debtors' secured lenders, oppose the Venue Motion. Moreover, the pre-negotiated RSA requires that these Chapter 11 Cases be administered in this Court. First Day Declaration, Ex. M.

18. The Debtors commenced these Chapter 11 Cases in this Court with the intent to (i) move beyond the PPA (whether due to its termination as the Debtors maintain or rejection) and sell power through alternate channels, either on the merchant market or through a new power purchase agreement, (ii) continue producing and selling renewable energy by entering into new arrangements with different buyers of energy and other products produced by the Facility, and (iii) seek confirmation and implementation of a chapter 11 plan. The support of the Senior Secured Noteholders, evidenced by the RSA and a proposed DIP Facility, is critical to the Debtors' ability to implement the contemplated restructuring. *See* First Day Declaration, Ex. M.

19. In sum, given the progress the Debtors have made to date with the Senior Secured Noteholders in connection with the DIP Financing in these Chapter 11 Cases, the Debtors respectfully submit that transferring the Chapter 11 Cases from their chosen forum in Delaware to New Hampshire at this juncture will cause unnecessary expense and delay and will place the Debtors' reorganization efforts in great jeopardy.

Argument

A. Venue of the Chapter 11 Cases is Proper in This District.

20. Venue is proper for a bankruptcy case in any judicial district where (i) the debtor's "domicile, residence, principal place of business . . . or principal assets" have been located for a "longer portion of the 180 days prior to the petition date; or (ii) the bankruptcy case of an affiliate is pending." 28 U.S.C. § 1408.

21. Berlin Station and Burgess BioPower are limited liability companies formed under the laws of the State of Delaware. Consequently, venue of these Chapter 11 Cases is proper in Delaware as a matter of law under 28 U.S.C. § 1408. *See, e.g., In re Rests. Acquisition I, LLC*, 2016 Bankr. LEXIS 684, at *6 (Bankr. D. Del. Mar. 4, 2016) ("Because the Debtor is organized under the laws of Delaware, this forum is proper under the statute."); *In re Innovative Commc'n*

Co., LLC, 358 B.R. 120, 125 (Bankr. D. Del. 2006) (“Venue is appropriate in the state of incorporation, 28 U.S.C. § 1408(1), so venue is proper in Delaware with respect to the corporate Debtors.”). Eversource does not, and cannot, challenge that venue is legally proper in this Court under 28 U.S.C. § 1408. Therefore, venue of these Chapter 11 Cases is properly before the Court.

B. The Convenience of the Parties Weighs Strongly in Favor of Maintaining Venue in Delaware.

22. Eversource has failed to establish that the requested transfer of venue would be in the interest of justice or for the convenience of the parties. A court may transfer venue “in the interest of justice or for the convenience of the parties.” 28 U.S.C. § 1412. *See also* Fed. R. Bankr. P. 1014(a) (“If a petition is filed in the proper district, the court . . . may transfer the case to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties If a petition is filed in an improper district, the court . . . may dismiss the case or transfer it to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.”).

23. The Court has recognized that when considering a motion to transfer venue under 28 U.S.C. § 1412 there is “a strong presumption of maintaining venue where the bankruptcy case is pending.” *In re Hayes Lemmerz Int’l Inc.*, 312 B.R. 44, 46 (Bankr. D. Del. 2004) (citations omitted) (preference action). *See also In re Mobile Tool Int’l, Inc.*, 320 B.R. 552, 556 (Bankr. D. Del. 2005) (adversary proceeding). Also, the Third Circuit has observed that the choice of forum should “not be lightly disturbed.” *Jumara v. State Farm Inc. Co.*, 55 F.3d 873, 879 (3d. Cir. 1995) (citations omitted) (analyzing 28 U.S.C. § 1404). *See Rita’s Water Ice, Inc. v. Josie’s Water Ice, Inc.*, No. Civ. A. 98-6603, 1999 WL 482319, at *4 (E.D. Pa. July 9, 1999); *In re Visteon Corp.*, Adv. No. 11-52073, 2011 WL 5025004, at *1 (Bankr. D. Del. Oct. 21, 2011) (in the context of preference actions “Courts generally defer to plaintiff’s decision of venue if it is legally proper”).

24. In considering the “convenience of the parties,” courts have identified the following six (6) factors, among others, to help guide their discretion:

- i. the economic administration of the estate;
- ii. the location of the assets;
- iii. the proximity of creditors of every kind to the court;
- iv. the proximity of the debtor to the court;
- v. the proximity of the witnesses necessary to the administration of the estate; and
- vi. the necessity for ancillary administration if liquidation should result.

See, e.g., In re Commonwealth Oil Refining Co., 596 F.2d 1239, 1247 (5th Cir. 1979) (“CORCO”); *Rest. Acquisition*, 2016 Bankr. LEXIS 864, at *7 (applying *CORCO* factors); *Innovative Commc’n*, 358 B.R. at 125 (citing *CORCO* factors and other private and public interests that may be relevant).

25. “Where a transfer would merely shift the inconvenience from one party to the other, or where after balancing all the factors, the equities leaned but slightly in favor of the movant, the [debtor’s] choice of forum should not be disturbed.” *Garden Manor*, 99 B.R. 551, 555 (Bankr. S.D.N.Y. 1988) (citing 1 James Wm. Moore, *et al.*, *Moore’s Federal Practice* P 56.10 (2d ed. 1988)); *In re Great Am. Res., Inc.*, 85 B.R. 444, 446 (Bankr. N.D. Ohio 1988) (“venue decisions should not merely shift the inconvenience from one party to another”) (citations omitted).

26. The movant, “bears the burden of demonstrating that the factors strongly weigh in favor of a transfer as courts will generally grant substantial deference to a debtor’s choice of forum.” *Rest. Acquisition*, 2016 Bankr. LEXIS 864, at *7 (citing *In re Enron Corp.*, 274 B.R. 327, 342 (Bankr. S.D.N.Y. 2002) (emphasis added). *See also In re Rehoboth Hospitality, LP*, 2011 Bankr. LEXIS 3992, at *10 (Bankr. D. Del. Oct. 19, 2011) (“Generally, there is a presumption in favor of maintaining the debtor’s choice of forum.”). This is a “heavy burden of proof . . . to

demonstrate that the balance of convenience weighs in [its] favor.” *Lionel Leisure, Inc. v. Trans Cleveland Warehouses, Inc. (In re Lionel Corp.)*, 24 B.R. 141, 142 (Bankr. S.D.N.Y. 1982).

27. As discussed in detail below, the consideration of the six (6) factors weighs in favor of keeping the Chapter 11 Cases in this Court. As such, Eversource has failed to meet its burden of proof.

i The Economic Administration of the Estate

28. The economic and efficient administration of the estate is generally considered the most important factor when considering a motion to transfer for the convenience of the parties. *CORCO*, 596 F.2d at 1247; *In re Caesars Entm’t Operating Co.*, 2015 Bankr. LEXIS 314, at *22 (Bankr. D. Del. Feb. 2, 2015); *Rest. Acquisition*, 2016 LEXIS 864, at *7. When analyzing this factor, courts focus on the potential adverse impact a transfer may have on a debtor’s ability to obtain financing and reorganize. *Rest. Acquisition*, 2016 LEXIS 864, at *13 (citing *In re Suzanne De Lyon, Inc.*, 125 B.R. 863, 869 (Bankr. S.D.N.Y. 1991)).

29. In the instant cases, transferring venue would undoubtedly result in an unwarranted increase in administrative costs to the Debtors at a time when the Debtors are already operating on a severely strained budget and timeline. *See In re Alcorn Corp.*, 2012 WL 2974889, at *3 (Bankr. E.D. Pa. July 2020) (denying venue transfer motion, explaining that increased administrative expenses frequently harm successful bankruptcy cases and that transferring venue would duplicate administrative expenses already incurred in the district in which case was pending). The Debtors are operating under severe liquidity restraints and transferring these cases from this District to the District of New Hampshire would subject the Debtors to unnecessary economic hardship and delay, which would jeopardize the pre-negotiated RSA and threaten the Debtors’ ability to successfully reorganize. Transferring these Chapter 11 Cases to New Hampshire would, among other things, require the Debtors to retain new or additional counsel,

who would have to familiarize themselves with the Debtors' operations, financial condition and strategic objectives.

30. The economic administration of a bankruptcy estate includes the need to maintain financing to fund a debtor's reorganization. *See In re Indus. Pollution Control, Inc.*, 137 B.R. 176, 182 (Bankr. W.D. Pa. 1992); *Enron*, 274 B.R. at 348. Equally important, Eversource's unilateral actions have made it close to impossible for the Debtors to operate and it could sound the death knell for any restructuring if venue is moved. Eversource's improper withholding of \$3.6 million in REC and capacity payments has left the Debtors with no cash to finance operations, and the uncertainty, delay and violation of heavily negotiated milestones threaten the Debtors' ability to obtain any financing at all, especially if moved to another forum. It is not an overstatement to say that by the time these Chapter 11 Cases were transferred to New Hampshire, the Debtors would be administratively insolvent.

31. If, however, to the contrary, these Chapter 11 Cases remain in Delaware, the relative burden on Eversource would be *de minimis*. Eversource already has demonstrated that it can effectively participate in this forum, having filed the Venue Motion, a motion shortening time, and objections to three first day motions, and then appearing, through counsel (from Virginia), at the hearing on the first day motions. D.I. 39, 40, 44, 46, 84. Indeed, were venue transferred, it would appear that Eversource would require a fourth professional – one admitted to practice in New Hampshire.

32. The pendency of the Cate Street Bankruptcy Case in New Hampshire does not support this factor or otherwise militate in favor of transfer of these Chapter 11 Cases to New Hampshire. Simply, this is nothing more than a "red herring" and has no relevance to the Debtors' bankruptcy proceedings before this Court. Not only has there been little to no activity in the Cate

Street Bankruptcy Case for approximately eighteen (18) months, but, upon information and belief, Bankruptcy Judge Harwood, who presides over the Cate Street Bankruptcy Case, will be retiring from the bench in the near future. As such, any bankruptcy judge in New Hampshire to whom these cases would be assigned, if transferred, will have to educate and familiarize her- or himself as to the status of the Chapter 11 Cases and its underlying issues, which would result in further delay.

33. Indeed, even accepting Eversource's contention that a venue change would be more convenient for the parties and witnesses (which is not the case), the "efficient administration of the case, such as the fact that the bankruptcy court ha[s] developed a substantial learning curve, weigh[s] in favor of retention of the case." *In re Enron*, 284 B.R. 376, 403 (Bankr. S.D.N.Y. 2002) (citing *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1391 (2d Cir. 1990)). Although this Court has not yet developed a "substantial learning curve," in only one week since the Petition Date, this Court has acquired knowledge and an understanding of the underlying issues of these Chapter 11 Cases and the Debtors' businesses (not to mention their proposed path to exit chapter 11) that the New Hampshire Bankruptcy Court overseeing the Cate Street Bankruptcy Case has yet to acquire. Accordingly, in the interest of justice, the Chapter 11 Cases should not be transferred.

34. For the above reasons, consideration of the economic impact that venue transfer would have on the estates – the most important factor when determining whether to transfer venue – strongly weighs against transferring the Chapter 11 Cases to New Hampshire.

ii The Location of the Assets

35. With respect to this factor, "courts have noted that the location of a company's assets is not as crucial to the analysis 'where the ultimate goal is rehabilitation rather than liquidation.'" *Rest. Acquisition*, 2016 LEXIS 864, at *12 (citing *Enron*, 274 B.R. at 347; *CORCO*,

596 F.2d at 1248); *see also In re Island Club Marina, Ltd.*, 26 B.R. 505, 508 (Bankr. N.D. Ill. 1983) (holding that “this factor is not controlling in reorganization cases”); *In re One—Eighty Invs., Ltd.*, 18 B.R. 725, 729 (Bankr. N.D. Ill. 1981) (“In a reorganization proceeding, however, the location of the assets of the Debtor is not particularly important.”). The Debtors are seeking a reorganization or sale, and not a liquidation; the location of their assets is not controlling.

36. *In re Restaurants Acquisition* is instructive. In that case, Judge Gross denied a motion to transfer venue to a bankruptcy court in Texas notwithstanding the fact that (i) the debtor had no assets in Delaware, (ii) the debtor operated thirty (30) restaurants throughout the State of Texas,⁸ and (iii) its largest assets (leasehold interests in stores and any furniture, fixtures and equipment located therein) were located in Texas. *Restaurants Acquisition*, 2016 LEXIS 864, at *2, 12-13. The *Restaurants Acquisition* Court noted that because the debtor’s “ultimate goal is rehabilitation rather than liquidation . . . [t]he Texas bankruptcy court’s proximity to the Debtor’s tangible assets provides minimal incremental benefits in the context of this chapter 11 proceeding.” *Id.* (internal quotations omitted). The Court also noted that while the debtor’s largest assets were in Texas, the debtor maintained its books and records in Tennessee. Still, the Delaware court retained the case.

37. Similarly, in *In re Energy Future Holdings, Corp.*, in denying a motion to transfer venue to the Northern District of Texas, Judge Sontchi stated that “this is not a close call” despite “the obvious location of assets, employees, operations, et cetra in Texas.” Case No. 14-10979-CSS, D.I. 627 at 626-27 (Bankr. D. Del. May 29, 2014)

⁸ As of the date of Judge Gross’s opinion, the debtor operated twelve (12) restaurants in Texas and employed 530 employees and staff, with all but four (4) living or working in Texas.

38. As in the *Restaurant Acquisitions* and *Energy Future Holdings* courts, this Court should likewise conclude that the location of the Facility does not weigh in favor of transfer venue to New Hampshire because the Debtors are pursuing a reorganization. Moreover, the additional cost and delay attendant to a transfer could be fatal to the Debtors' restructuring efforts.

iii The Proximity of Creditors of Every Kind

39. This factor alone, even if it strongly favors transferring venue, which it does not, is not determinative. *Enron*, 284 B.R. at 400 (citations omitted). Here, there would be "little or no effect on creditor participation" (*id.*) as the Debtors' Senior Secured Noteholders and the Collateral Agent are based in states other than New Hampshire, notably: (i) the Prudential affiliated lenders are headquartered in New Jersey, which is closer in proximity to Delaware than to New Hampshire, and (ii) Deutsche Bank, the Collateral Agent, is located in New York City, which also is more convenient to Delaware than New Hampshire. To the contrary, transferring these Chapter 11 Cases to New Hampshire will unnecessarily burden the Debtors' pre-petition lenders and proposed DIP lenders, who have affirmatively supported the Debtors' choice of venue. *See Suzanne De Lyon*, 125 B.R. at 868 ("Of particular significance is the desire of the two (2) secured banks [which hold 97% of the secured debt] to keep the case in New York. As the creditors with the most to lose from this bankruptcy, they are the true interested parties in this case and their opinion as to what would be most convenient for them carries great weight since the possibility of a distribution to unsecured creditors, including the movants, is problematic.").

40. With regard to unsecured creditors, the Debtors are generally current with their trade obligations. The Debtors believe that they have only a *de minimis* amount of unsecured debt,

other than possible critical vendor claims, which they are seeking authority to pay in full through the critical vendor motion [D.I. 11] and through their plan of reorganization.⁹

41. The Debtors' two (2) service providers – CS Operations and CS Berlin Ops – which are counterparties to the two primary executory service contracts - are Delaware corporations located in Florida. These entities are also signatories to the Restructuring Support Agreement, pursuant to which they supported the Debtors' selection of venue in this Court.

42. Moreover, Eversource's financial resources and its interest in these Chapter 11 Cases are such that allowing these Chapter 11 Case to remain in Delaware will not "chill" or diminish its participation as a creditor. Indeed, in addition to hiring Delaware counsel, Eversource retained two (2) Virginia law firms who have no New Hampshire office: (i) Law Office of Russell R. Johnson III, PLC, located in Manakin-Sabot, Virginia and (ii) Hunton Andrews Kurth LLP, located in Richmond, Virginia. D.I. 39, 40, 44, 46, 84. Virginia is much closer in proximity to Delaware than New Hampshire.

43. The below chart identifies the professionals for the interested parties and their respective counsel. None of the listed professionals are located in New Hampshire.

Role	Firm	Location
Co-Counsel for Debtors	Foley Hoag LLP	Boston, Massachusetts New York, New York
Co-Counsel for Debtors	Gibbons P.C.	Wilmington, Delaware Newark, New Jersey
Investment Banker for Debtors	SSG Capital Advisors, LLC	Philadelphia, Pennsylvania
Chief Restructuring Officer for Debtors	Dean Vomero, Applied Business Strategy LLC	Cleveland, Ohio New York, New York

⁹ Thus, critical vendors such as Richard Carrier Trucking -- who Eversource speculates is a creditor who would find it more convenient to have the Chapter 11 Cases in New Hampshire -- will largely be unaffected by these Chapter 11 Cases. See First Day Declaration at ¶ 63.

Co-Counsel for Eversource	Hunton Andrews Kurth LLP	Richmond, Virginia
Co-Counsel for Eversource	Law Office of Russell R. Johnson III, PLC	Manakin-Sabot, Virginia
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44. In support of the Venue Motion, Eversource baldly asserts that the Debtors’ “contacts with New Hampshire are substantial, more so than any other place in the World.” *See* Venue Motion at ¶¶ 82-83 (citation omitted). In support of such proposition, Eversource relies on two readily distinguishable cases.

45. First, Eversource relies on *In re Malden Mills Indus., Inc.*, 361 B.R. 1, 10 (Bankr. D. Mass. 2007) yet fails to discuss a fundamental aspect of *Malden Mills*—the debtor filed a second bankruptcy case in Delaware only fourteen (14) hours after the Massachusetts bankruptcy court closed the debtor’s initial case based upon a consensual motion. *Id.* at 6-9. There, the Massachusetts court was “very familiar with the facts and litigants, having presided over the Debtor’s previous reorganization” and “well versed on the terms of the Debtor’s confirmed plan and other documents . . . should the need arise to interpret them, which some parties expect will occur.” *Id.* at 10. Most importantly, the *Malden Mills* debtor “chose the time of filing [its second bankruptcy case], not apparently based on its economic situation and the needs of all constituencies, but to facilitate venue selection, possibly to the detriment of the estate.” *Id.* at 11.

Consequently, the debtor's second bankruptcy case was transferred from Delaware to Massachusetts under Fed. R. Bankr. P. 1014(b). *Id.*

46. Second, Eversource affixes as Exhibit 8 to the Venue Motion the motion and related order transferring venue from *In re GNP Maine Holdings, LLC*, Case No. 14-12179, D.I. 10, 43 (Bankr. D. Del. 2014). Putting aside Eversource's inappropriate reliance on and embellishment of the *GNP Maine Holdings* motion papers, Eversource omits a critical aspect of *GNP Maine Holdings*: GNP Maine Holdings had sought to liquidate (not restructure) its assets. GNP Maine Holdings had filed a chapter 7 petition in Delaware, and the appointed Delaware chapter 7 trustee was charged with liquidating assets located exclusively in Maine. *Id.* at D.I. 10, 36, 40. Moreover, the motion to transfer venue at issue in that case was supported by more than 20 interested parties, many of whom had filed an involuntary petition against the debtor in Maine (unaware of the voluntary petition filed in Delaware), and had been actively participating in the proceedings in Maine. *Id.* at D.I. 18, 42. Under these facts, it is not surprising that the Delaware court transferred the *GNP Maine Holdings* bankruptcy to Maine. *Id.* at D.I. 43.

47. Contrary to Eversource's misplaced assertion, the Debtors' Chapter 11 Cases were not filed under "remarkably similar facts" as those in *Malden Mills* or *GNP Maine Holdings*. See Venue Motion at ¶¶ 82-83. The Debtors are not debtors in bankruptcy proceedings pending in another venue, nor are the Debtors attempting to avoid scrutiny by any such court. The Debtors, with the support of their Senior Secured Noteholders under the Restructuring Support Agreement, properly commenced these Chapter 11 Cases in this District to pursue a balance sheet reorganization on notice to all creditors. Accordingly, as the *Enron* court observed, this Court can anticipate "[Eversource's] continued participation in this case, as well as participation by any other

interested creditor wherever located,” if the Chapter 11 Cases remain in Delaware. *Enron*, 284 B.R. at 400 (citations omitted).

iv The Proximity of the Debtors and Witnesses Necessary to the Administration of the Estate

48. This factor weighs squarely against transfer. Although the Debtors’ production operations are predominantly in New Hampshire, the Debtors’ problems are financial, not operational, and their restructuring efforts since the Petition Date and before have been focused in states in which the professionals are located – none of which, as explained above, are located in New Hampshire. The Debtors are “no longer the same entities that [they were] before the bankruptcy filing. [They are] now [] debtor[s]-in-possession and with such a status [they have] abandoned [their] pre-petition existence to one now dependent on a different series of considerations.” *Enron*, 284 B.R. at 394. Executive decision-making in terms of the Chapter 11 Cases now lies with SSG personnel, Mr. Vomero, independent directors and various professionals, none of whom are located in New Hampshire.

49. As the court observed in *In re Restaurants Acquisition*:

The fact that the Debtor’s restaurants and offices are located in Texas and Tennessee is not dispositive with respect to this factor. Courts have noted **the inquiry should focus primarily on the location of parties that must appear in court.** See *CORCO*, 596 F.2d at 1248 (“The concern is with the corporation’s employees who must appear in court, not with the employees who are on the production line.”); *Enron*, 274 B.R. at 347 (“the certain participants in the proceedings before this Court will be the professionals retained in these cases.”); *Caesars*, 2015 Bankr. LEXIS 314, at *20 (“In the *CORCO* convenience analysis, courts often focus more closely on the location of the debtors’ and creditors’ professionals.”).

2016 LEXIS 864, at *11 (emphasis added).

50. As set forth in the above chart, none of the Debtors’ professionals are in New Hampshire. In fact, since assuming the role of Chief Restructuring Officer on October 27, 2023,

Mr. Vomero has visited the Facility merely once, for approximately six hours. Vomero Declaration at ¶ [].

51. The Debtors' independent directors are based in Delaware with the exception of one director who is based in Ohio and visits Delaware monthly or quarterly for several days, and one director who is based in Texas.

52. Moreover, CS Operations, which is located in Florida and incorporated in Delaware, provides the Debtors with management services, including, among other things: providing executive management services; preparing and distributing all financial statements, other financial reports, budgets, estimates, tax returns and other information; accounting, billing and other similar cash management services; reviewing, analyzing and recommending actions to Berlin Station regarding obtaining and the maintenance and renewal of all required insurance; reviewing and analyzing Facility data regarding compliance of regulatory permits; advising with respect to proposed modification, repair or replacement of the Facility; assisting with the procurement and management of fuel for use at the Facility; coordinating and overseeing payroll services; and providing and coordinating public relations and regulatory affairs services. The Debtors do not operate or manage the Facility on a day-to-day basis.

53. The Debtors do not have any employees. All of the personnel at the Facility are provided by CS Berlin Ops, which is headquartered in Florida and incorporated in Delaware. In any event, it is extremely unlikely that any of the personnel at the Facility will be witnesses in these Chapter 11 Cases. Eversource's assertions that the personnel at the Facility "presumably

reside in or very near New Hampshire” and that “they regularly conduct business in New Hampshire in connection with the Facility” are irrelevant. Venue Motion at ¶ 76.¹⁰

54. Most of the key personnel of CS Operations and CS Berlin Ops are located in Florida, where they maintain their main offices. Delaware is a more convenient forum than New Hampshire for these entities and their personnel, and, like other interested parties, they have retained local counsel in Delaware. D.I. 19.

v The Necessity for Ancillary Administration if Liquidation Should Result

55. The final factor – the necessity for ancillary administration if liquidation should result – weighs against transfer of venue in these Chapter 11 Cases because the Debtors intend to pursue a restructuring plan that will provide for the ongoing operations of the Debtors’ enterprise. See *In re Rests. Acquisition*, 2016 Bankr. LEXIS 684, at *14 (“The Debtor’s reorganization strategy does not contemplate liquidation, and therefore there is no need for the Court to discuss the sixth and final factor, the necessity for ancillary administration.”). First Day Declaration at ¶ 75.

56. As the courts in *CORCO* and *Fairfield Puerto Rico* recognized, “anticipation of the failure of the [Chapter 11] proceeding is an illogical basis upon which to predicate a transfer.” *CORCO*, 596 F.2d at 1248 (quoting *In re Fairfield Puerto Rico, Inc.*, 333 F. Supp. 1187, 1191 (D. Del. 1971)). Indeed, “[t]his factor is often discounted by courts.” *Enron*, 274 B.R. at 343 n. 11.

57. In sum, Eversource has failed to demonstrate by a preponderance of the evidence that consideration of the above factors weighs in favor of transferring the Chapter 11 Cases to New Hampshire.

¹⁰ Further, these individuals will also largely be unaffected by these Chapter 11 Cases if the Debtors are able to pursue confirmation of their plan because the Debtors have paid, and intend to pay, for their continued services.

C. The Interest of Justice is Not Served By Transferring Venue.

58. Eversource has failed to meet its burden under the second prong of 28 U.S.C. § 1412, which gives the Court discretion to order a transfer of venue if doing so would be “in the interest of justice.” When determining whether a transfer would serve the interests of justice, courts consider “whether transfer of venue will promote the efficient administration of the estate, judicial economy, timeliness, and fairness.” *Enron*, 274 B.R. at 387. These factors are addressed in the discussion above regarding whether venue transfer is appropriate “for the convenience of the parties” —the first prong of § 1412. For similar reasons, the “interests of justice” support keeping these Chapter 11 Cases in Delaware.

D. Eversource’s Additional Arguments in Support of the Venue Motion are Irrelevant.

59. Eversource further argues that venue should be transferred due to: (1) the ease of access to necessary proof; (2) the availability of subpoena power for unwilling witnesses; (3) the enforceability of any judgments rendered; (4) the ability to receive a fair trial; and (5) the state’s interest in having local controversies decided within its borders. However, careful consideration of these additional factors further supports the Chapter 11 Cases remaining in this District.

i. Enforceability of Judgments Rendered and Ability to Receive a Fair Trial

60. Eversource concedes that the “there is no reason to believe that judgments and orders entered by either the Delaware Bankruptcy Court or the NH [sic] Bankruptcy Court would not be given full faith and credit by other courts or that any parties in interest would be unable to obtain a fair trial in either court.” Venue Motion at ¶ 97. Thus, these factors weigh in favor of leaving the Debtors’ choice of forum undisturbed.

ii. Ease of Access to Necessary Proof

61. Eversource incorrectly posits that because the Facility is located in New Hampshire, the Debtors’ books and records are located in that state. Venue Motion at ¶ 17. As

discussed herein, the Debtors' operations are managed by CS Operations, which is located in Florida, and Mr. Vomero is based in Ohio. Inasmuch as the Debtors' books and records are kept and may be produced in digital format, their physical location is not a factor that weighs in favor of transfer. As for current or former personnel who allegedly have relevant information, depositions may be conducted remotely.

iii. Availability of Subpoena Power and Expense of Obtaining Unwilling Witnesses

62. Eversource's assertion that "many necessary witnesses are likely beyond this Court's subpoena power" [Venue Motion at ¶ 88] is vague and speculative and Eversource has not shown that keeping these Chapter 11 Cases in Delaware will impose greater expenses on the estate than if they are transferred to New Hampshire. The costs of the Debtors' professionals and other professionals to travel to New Hampshire (or the need for the Debtors to retain new counsel in New Hampshire if the Venue Motion is granted) would exceed the costs and expenses that will be incurred if the Chapter 11 Cases remain in Delaware. At best, these factors are neutral. They do not "weigh heavily" in favor of transfer of venue as Eversource asserts. Venue Motion at ¶ 88.

iv. State's Interest in Having Local Controversies Decided Within its Borders

63. Eversource completely ignores Delaware's strong interest in having disputes involving Delaware-incorporated entities decided within its borders. *See generally In re Energy Future Holdings, Corp., et al.*, Case No. 14-10979-CSS, D.I. 627 at 626-27 (Bankr. D. Del. May 29, 2014) ("This Court finds that state of incorporation is not just an allowed basis for venue, but reliance on it is wholly appropriate.").

64. In an attempt to show New Hampshire's interest in the Debtors' Chapter 11 Cases, Eversource relies on *Reboboth Hospitality*, 2011 Bankr. LEXIS 3992, at *14-15, a single asset real estate case, in which the central issue was likely to be the value of the real estate. Venue Motion at ¶ 88. As such, the Delaware court transferred venue because the Texas court "with its

local knowledge of the property, locale and real estate values, is better situated to preside over this case.” *Rebooth Hospitality*, 2011 Bankr. LEXIS 3992, at *14-15. Although the Debtors are a “primary importance” of the Berlin, New Hampshire, community, the Debtors are pursuing a reorganization, and the value of the Facility and local real property laws are not at the forefront of these cases. *See id.*

65. At the same time, Eversource’s reliance on New Hampshire Public Utilities Commission’s (“NHPUC”) (unfounded) interest in the Chapter 11 Cases and the impact of the Chapter 11 cases on ratepayers is misplaced. To be clear, the NHPUC regulates Eversource—not the Debtors. Debtor Berlin Station is qualified as an “exempt wholesale generator” under regulations adopted by the Federal Energy Regulatory Commission. *See* 18 C.F.R. 366.7. As an exempt wholesale generator, Berlin Station is expressly exempt from regulation by the NHPUC. *See* N.H. Revised Statutes Annotated 362:4-c (exempt wholesale generators exempt from definition of public utility under N.H. Revised Statutes Annotated 362:4). Debtor Burgess BioPower is an energy services company whose activities fall well outside the scope of the NHPUC’s jurisdiction. *See generally*, N.H. Revised Statutes Annotated 364:4 (defining public utility) and N.H. Revised Statutes Annotated 374:3 (defining the NHPUC’s jurisdictional authority over “public utilities”).

66. While the NHPUC has an interest in these proceedings, it does not intend to be an active participant in these Chapter 11 Cases. As Eversource is well aware, at a hearing last week, the NHPUC informed Eversource’s counsel that it did not intend to participate in any bankruptcy proceeding, and it directed Eversource to amend its Venue Motion at paragraphs 80 and 92, in which Eversource incorrectly represented that the NHPUC is likely to be an active participant in these Chapter 11 Cases. *See* Malone Declaration at ¶ 7, Ex. F, pp. 26-28. This Court,

to the extent necessary, is more than capable of protecting any legitimate New Hampshire State interest that arise during the Chapter 11 Cases.

Reservation of Rights

67. The Debtors reserve their right to revise, amend or supplement this Objection at any time or at any further hearing on the Venue Motion.

Conclusion

68. For the foregoing reasons, Eversource has fallen short of meeting its heavy burden of establishing that the Debtors' Chapter 11 Cases should be transferred to New Hampshire under 28 U.S.C. § 1412 based on either the convenience of the parties or the interest of justice. A weighing of all of the relevant factors dictates that the Chapter 11 Cases should remain in Delaware, where the cases were properly filed. The Venue Motion should be seen for what it is, a blatant "litigation tactic" that, if granted, will deprive the Debtors of their choice of forum and destroy their restructuring efforts.

WHEREFORE, the Debtors respectfully request that this Court enter an order denying the Venue Motion and granting such other and further relief as this Court deems appropriate.

Dated: February 20, 2024
Wilmington, Delaware

/s/ Katharina Earle

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